Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	DOCKET FILE COPY ORIGINAL
	)	
Interconnection and Resale	)	CC Docket No. 94-54
Obligations Pertaining to	)	
Commercial Mobile Radio Services	)	

[redacted]

PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

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SUMMARY

The Personal Communications Industry Association ("PCIA") seeks reconsideration and clarification of certain aspects of the Commission's *First Report and Order* in CC Docket No. 94-54, which imposed a mandatory federal resale obligation on various commercial mobile radio service ("CMRS") operators.[1]

PCIA submits that an analysis of the costs and benefits of a CMRS resale requirement -- particularly when viewed in conjunction with recent legislative and marketplace developments -- makes clear that no CMRS operators should be subject to such an obligation. Accordingly, PCIA asks the Commission to reconsider its decision and to remove the affirmative resale requirement as applied to all CMRS providers.

Resale obligations have historically been imposed as a mechanism to increase -- or create -- competition in highly concentrated market segments. Until the adoption of the CMRS resale rule, the Commission had imposed an affirmative resale requirement only on service categories where an individual provider or class of providers possessed market power, *i.e,* in the case of private line services, public switched network services, and early cellular telephone services.

The CMRS industry is readily distinguishable from these offerings. The level of competition already present in the CMRS marketplace, including that portion offering two-way switched voice and data services, is much greater than in any other telecommunications

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[1] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, FCC No. 96-263, (released July 12, 1996) [hereinafter *First Report and Order*].

segment where a federal resale requirement has been imposed, and will increase significantly over the next few years without a mandatory resale rule. Broadband PCS is expected to be available on a widespread basis later this year, and will produce at least three, and possibly as many as six, new competitors to cellular in each market. In addition, wide-area SMR operators are expected to offer services competitive with cellular and broadband PCS, as will some paging and narrowband PCS operators.

The record demonstrates that these emerging services are already having a significant impact on carrier pricing and practices. As such, the marketplace is accomplishing on its own everything that Commission could hope to bring about by adopting a mandatory resale requirement. Consequently, there is little conceivable benefit to be gained from the imposition of a mandatory resale rule. As the Commission is well aware, however, the costs of such an obligation are substantial and will undoubtedly put upward pressure on subscriber rates.

At a minimum, if the Commission retains the CMRS resale requirement, PCIA asks that it revise or clarify the action taken in the *First Report and Order* in the following respects:

- The Commission should modify the text of the CMRS resale rule to make clear that only *unreasonable* resale limitations are prohibited;
- The Commission should clarify that the resale rule does extend to non-Title II customer premises equipment ("CPE") included in bundled service and equipment packages;
- To protect CMRS licensees' incentives to develop and offer innovative services, the Commission should make plain that the CMRS resale rule does not require carriers to provide access to proprietary technologies and products; and

- The Commission should revise the definition of "covered SMR providers" to premise the determination of whether a particular SMR system is "covered" on a simple mobile count.

PCIA submits that action consistent with these recommendations will promote the public interest by eliminating unnecessary and unduly burdensome regulatory requirements and by allowing the CMRS marketplace to reach its full potential to the ultimate benefit of the public.

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To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, the Personal Communications Industry Association ("PCIA") respectfully requests reconsideration and clarification of certain aspects of the Commission's *First Report and Order* adopted June 12, 1996, in the above-captioned proceeding.[1]

PCIA commends the Commission's effort to formulate resale obligations tailored to the competitive conditions that characterize affected commercial mobile radio service ("CMRS") offerings. In this regard, PCIA applauds in particular the Commission's determination that a mandatory resale obligation is unnecessary in the case of paging and narrowband personal communications services ("PCS").

In PCIA's view, however, an analysis of the costs and benefits of a resale requirement in the CMRS context -- especially when viewed in conjunction with recent legislative and marketplace developments -- leads to the conclusion that no CMRS

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[1] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, FCC No. 96-263, (released July 12, 1996) [hereinafter *First Report and Order*].

operators should be subject to a mandatory federal resale obligation. Accordingly, PCIA requests the Commission to reconsider its decision and to remove the affirmative resale requirement as applied to all CMRS operators.

In the alternative, should the Commission decide to retain the CMRS resale rule, PCIA urges the agency to revise or clarify the action taken in the *First Report and Order* in the following respects:

- The Commission should modify the text of the CMRS resale rule to make clear that only *unreasonable* resale limitations are prohibited;
- The Commission should clarify that the resale rule does extend to non-Title II customer premises equipment ("CPE") included in bundled service and equipment packages;
- To protect CMRS licensees' incentives to develop and offer innovative services, the Commission should make plain that the CMRS resale rule does not require carriers to provide access to proprietary technologies and products; and
- The Commission should revise the definition of "covered SMR providers" to premise the determination of whether a particular SMR system is "covered" on a simple mobile count.

PCIA submits that the adoption of rule changes and clarifications consistent with these recommendations will promote the public interest by eliminating unnecessary and unduly burdensome regulatory requirements. The removal of such unwarranted regulatory intrusions will, in turn, promote Congress's goal that a "pro-competitive, deregulatory national policy framework"[2] be established for the telecommunications

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[2] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

industry, and will allow the CMRS marketplace to reach its full potential to the ultimate benefit of consumers.

I. Background

The *First Report and Order* is the latest in a series of proceedings initiated to implement Congress's 1993 directive that substantially similar mobile services are subject to comparable regulatory requirements.[3] In the *First Report and Order*, the Commission attempted to determine the appropriate level of resale obligations to be applied to various CMRS providers, including cellular, broadband PCS, specialized mobile radio ("SMR"), narrowband PCS, and paging.

The Commission found that current market conditions are such that the existing cellular resale obligation should continue to apply to cellular operators and should be extended to broadband PCS and certain SMR providers.[4] Anticipating that the level of competition in the affected market sector after broadband PCS D, E, and F licensees have built out their systems will render the resale rule unnecessary, the Commission decided to sunset the CMRS resale rule five years after the last group of initial licenses for currently allotted broadband PCS spectrum is awarded.[5]

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[3] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1418 (1994).

[4] *First Report and Order*, ¶¶ 17-18.

[5] *Id.* ¶ 24.

II. An Analysis of the Costs and Benefits of a Mandatory CMRS Resale Requirement Indicates That Such a Requirement Is Unnecessary and Inappropriate.

In the *First Report and Order*, the Commission recognized that a resale rule is not appropriate for all markets at all times.[6] In addition, the Commission noted that restrictions on resale and discrimination against resellers are not necessarily violative of Sections 201 and 202 of the Communications Act. Rather, the appropriateness of a resale restriction rests on an analysis of the respective costs and benefits to public and private interests.[7] Although the Commission's cost/benefit analysis led it to conclude that the benefits of applying a mandatory federal resale requirement outweigh the costs in the case of cellular, broadband PCS, and wide-area SMR operators offering two-way switched voice and data services, PCIA submits that the costs of imposing a mandatory CMRS resale rule far outweigh the benefits and that imposition of a CMRS resale requirement cannot be reconciled with the spirit of the Telecommunications Act of 1996 or recent developments in the CMRS marketplace.

Resale obligations have historically been imposed as a mechanism for increasing -- or creating -- competition in highly concentrated market segments. Until the adoption of the CMRS resale rule, the Commission had imposed an affirmative resale obligation only on service categories where an individual provider or class of providers

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6 *Id.* ¶ 14.

7 *Id.*

possessed market power -- *i.e.*, in the case of private line services, public switched network services, and early cellular telephone services.[8] In the wireline context, a mandatory resale requirement was viewed as a means to exert pressure on monopoly telephone operators to offer more competitive rates.[9] Similarly, the initial decision to impose a mandatory cellular resale requirement was premised on a desire to minimize the headstart advantage of wireline licensees and to open the cellular duopoly to additional competition.[10]

The level of competition currently existent in the CMRS marketplace, including that portion offering two-way switched voice and data services, is much greater than that in any other telecommunications segment where a federal resale requirement has been imposed, and will increase significantly over the next few years without a mandatory resale obligation. Broadband PCS is expected to be available on a widespread basis later this year, and the Commission's spectrum allocation scheme

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[8] *See* Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261, 263 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied,* 439 U.S. 875 (1978) (private line services) [hereinafter *Resale and Shared Use Decision*]; Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC 2d 167 (1980) (public switched network services) [hereinafter *Public Switched Network Services Decision*]; Cellular Communications Systems, 86 FCC 2d 469, 511, 642 (1981), *modified,* 89 FCC 2d 58, *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom.* United States v. FCC, No. 82-1526 (D.C. Cir. Mar. 3, 1983) (cellular) [hereinafter *Cellular Resale Decision*].

[9] *Resale and Shared Use Decision*, 60 FCC 2d at 298-303; *see also Public Switched Network Services Decision*, 83 FCC 2d at 172.

[10] *Cellular Resale Decision*, 86 FCC 2d at 511.

guarantees the emergence of at least three, and possibly as many as six, new competitors to cellular in each market. In addition, wide-area SMR operators are expected to offer services competitive with cellular and broadband PCS, as will some paging and narrowband PCS providers.[11]

Although the Commission apparently does not believe that these new services will act as a meaningful competitive force until five years after the D, E, and F block broadband PCS licenses are awarded, the record indicates that the additional competition provided by PCS and SMR providers is already having a significant impact. For example, available data, including the Commission's *CMRS Annual Report,* already indicate that cellular prices have been declining in anticipation of the wide-spread introduction of PCS.[12] It is estimated that cellular prices will fall more

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[11] *See* Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993 -- Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 10 FCC Rcd 8844, 8871 (1995) (noting that broadband PCS, interconnected SMRs, narrowband PCS, unlicensed PCS, satellite-based systems, and other future services are potential sources for competition in the mobile services marketplace) [hereinafter *CMRS Annual Report*]; *see also* Carl Robert Aron, *The Challenges of the Wireless Ice Age*, Business Communications Review, Vol. 25, No. 10 (Oct. 1995) ("The PCS auctions could theoretically provide as many as six new operators in each territory, but it seems more likely that between three and five independent PCS operators will join the two cellular carriers in each service territory. The total number of facilities-based competitors could rise from two to between four and seven (two cellular, four PCS, one ESMRS), a total that does not include resellers.").

[12] In the *CMRS Annual Report*, the Commission noted that "[c]ellular pricing has begun to reflect in part the impending introduction of PCS . . . carriers are reducing prices and beginning to offer packages that resemble expected PCS offerings." *CMRS Annual Report* , 10 FCC Rcd at 8851-52. *See also* Information Access

(continued...)

dramatically within the next two years.[13] Similarly, the General Accounting Office ("GAO") estimates that in one to two years, additional competition from PCS offerings should be sufficient to influence the pricing of existing mobile services, even if PCS is not widely available for several years.[14]

It is well recognized that, in a competitive environment where capacity is prevalent and services are largely substitutable, as is the case with broadband CMRS

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[12](...continued)
Company, *Mergers Characterize U.S. Cellular Market; Competitors Cause Price Slashes*, Mobile Phone News, No. 45, Vol 13 (Nov. 6, 1995) ("PCS will have a direct impact on cellular in the next five years, causing operators to slash prices and develop enhanced digital services."); Carl Robert Aron, *The Challenges of the Wireless Ice Age*, Business Communications Review Vol. 25, No. 10 (Oct. 1995) (noting that cellular average revenues per subscriber are currently decreasing at the rate of 8 percent per year and that aggressive price competition is expected to begin in late 1996 or early 1997 as PCS providers begin providing service -- decreases of 10 percent per year in cellular average revenues per subscriber "would seem conservative" after the introduction of PCS).

[13] *See supra* note 12. In the *CMRS Annual Report*, the Commission noted that "[e]stimates of the eventual downward impact of broadband PCS entry on cellular prices range as high as forty percent in the next two years." *CMRS Annual Report*, 10 FCC Rcd at 8871.

[14] *See* Statement of John H. Anderson, Jr., Director, Transportation and Telecommunications Issues, Resources, Community and Economic Development Division, General Accounting Office, Before the U.S. House of Representatives Subcommittee on Oversight and Investigations, Committee on Commerce, at 9 (Oct. 12, 1995). In addition, the Commission and trade press generally agree that the introduction of PCS will increase innovation in cellular offerings at least by hastening the conversion of cellular networks from analog to digital technology. *See CMRS Annual Report*, 10 FCC Rcd at 8852 n.34; *see also* Information Access Company, *Mergers Characterize U.S. Cellular Market; Competitors Cause Price Slashes,* Mobile Phone News, No. 45, Vol. 13 (Nov. 6, 1995) (predicting that the introduction of PCS will cause cellular operators to develop enhanced digital services).

offerings, facilities-based carriers cannot gain a competitive advantage by seeking to deny resale capacity because resellers can simply go to another provider to obtain service.[15] Moreover, in such an environment, facilities-based operators have an incentive to promote distribution of their services through the use of resellers. In particular, because of the number of existing and emerging competitors, resale serves as a cost-effective way for existing operators to maximize system usage while minimizing operating expenses.[16] This is especially true where service providers face extremely high spectrum acquisition and operating costs, as is the case with broadband PCS and possibly SMR licensees.

As a case on point, NextWave Personal Communications, Inc. ("NextWave"), which paid over $4 billion for numerous C-block broadband PCS licenses in several major metropolitan areas in the midwest, has announced that it plans to operate solely

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[15] *See, e.g.*, Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, Remarks at the National Wireless Resellers Association Conference on Wireless Resale: The Path to the Future (April 25, 1996).

[16] *Id. See also* Information Access Company, *Resale Seminar Pinpoints Trends that Affect All Wireless Players*, Mobile Phone News, No. 19, Vol. 14 (May 6, 1996) ("Cellular carriers seem to be changing their attitudes toward resellers to a more cooperative rather than antagonistic stance. With the coming of new competitors, carriers have the incentive to use resellers to expand their coverage and maximize capacity.")

through resellers with no retail customers of its own.[17] Recently, Cincinnati Bell agreed to buy and resell several billion minutes from NextWave's PCS network.[18]

Despite the fact that little actual benefit will derive from an affirmative resale obligation, imposition of a mandatory resale requirement will create significant costs for affected CMRS operators and consumers. These include: (1) substantial legal and administrative costs implicated by the need to review each contract for compliance with federal resale obligations and litigate resultant disputes; (2) costs to consumers as a result of deterred aggressive pricing practices, constrained volume pricing techniques, and thwarted innovative offerings;[19] (3) costs to consumers resulting from discouraged marketplace negotiations; and (4) costs associated with disputes arising out of carriers' efforts to negotiate resale contracts that take into account the considerable expense of modifying end-user units and billing systems, among other things.[20]

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[17] *See* Information Access Company, *C-Block Auction Grinds To A Halt With Round 184; Next Step: Petitions To Deny and Court Challenges*, PCS Week, No. 19, Vol. 7 (May 8, 1996).

[18] *See* Warren Publishing, Inc., Communications Daily, Vol. 16, No. 155, at 6 (August 9, 1996).

[19] *See, e.g.*, Jerry A. Hausman, *The Cost of Cellular Regulation*, at 13 (Jan. 3, 1995) (commenting that certain regulatory procedures adversely affect competition by requiring public disclosure of prices, and noting that cellular resellers in California have protested to the California Public Utilities Commission if they view a facilities-based carrier's prices to be too low).

[20] For example, accommodating resale requires technologies using "subscriber identity module" or "SIM" cards to make modifications to both SIM card software and the handset itself. Software on the SIM card would require modification to add a parameter to identify a reseller. In addition, to preserve handset locking

(continued...)

Finally, both the spirit of the Telecommunications Act of 1996[21] and the Commission's policy of allowing market forces to shape the development of wireless services dictate against the imposition of a mandatory CMRS resale obligation. In particular, Congress's primary objective in enacting the 1996 Act was to establish "a pro-competitive, de-regulatory national policy framework" for the telecommunications industry.[22] Similarly, the Commission has repeatedly advocated its preference for allowing market forces rather than regulation to shape the development of wireless services.[23] In addition, new Section 10(a) of the Act directs the Commission to forbear from applying any regulation or provision if: (1) enforcement is not necessary to ensure that the charges, practices, classifications, or regulations for or used in connection with that carrier or telecommunications service are just and reasonable; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest. PCIA submits that the same analysis ought to apply where the imposition of a new regulatory requirement is at issue. Taken together, these provisions and policies require the Commission to ensure that any new regulatory

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[20](...continued)
capabilities, which are critical to fraud prevention, the handset would require modification to recognize the new data element on the SIM.

[21] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[22] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

[23] *See, e.g.*, Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, FCC No. 96-284, ¶¶ 26, 27 (released Aug. 13, 1996).

requirement is sufficiently justified and not unnecessarily burdensome or otherwise injurious. As outlined above, this is simply not the case with the CMRS resale requirement.

III. If the Commission Retains the Mandatory CMRS Resale Obligation, It Should Revise and Clarify the CMRS Resale Requirement In Several Respects.

A. The Commission Should Amend the CMRS Resale Rule To Make Plain That the Rule Prohibits Only *Unreasonable* Restrictions on Resale.

In its current form, the CMRS resale rule states that each carrier subject to the rule "must permit *unrestricted* resale of its service."[24] This language is inconsistent with the Commission's existing resale policies and the text of the *First Report and Order*. As recognized in the *First Report and Order*, existing resale policies do not prohibit *all* restrictions on resale. Rather, these policies only prohibit restrictions that are *unreasonable*.[25]

If the Commission retains the CMRS resale requirement, PCIA requests that the text of the new rule be modified to reflect that only *unreasonable* restrictions on resale are prohibited. In particular, the rule should state that "carriers subject to this Section shall not impose any unreasonable restrictions on resale of their service."

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[24] *First Report and Order*, Appendix C at 2 (emphasis added).

[25] *First Report and Order*, ¶ 12.

B. The Commission Should Clarify That the CMRS Resale Rule Does Not Apply To Customer Premises Equipment ("CPE") in Bundled Service and CPE Packages.

In the *First Report and Order*, the Commission disagreed with AT&T's mention that the CMRS resale obligation would apply only to services regulated under Title II, and therefore, that the rule would not extend to customer premises equipment ("CPE") in bundled service and CPE packages.[26] In response to AT&T's comment, the Commission stated that it was concerned that "excluding from the resale rule all bundled packages that include non-Title II components would potentially offer carriers an easy means to circumvent the rule" and that, as a result, it would "not as a general matter limit application of the resale rule as AT&T requests."[27]

The precise meaning of the Commission's response to AT&T's comment is unclear. It appears to imply that bundled packages that include non-Title II components will not necessarily be excluded from the resale rule. Even this reading is somewhat ambiguous, however, because there is no dispute that the service component of a bundled package would be subject to a resale requirement, if one existed. The CPE component, however, is not subject to Title II and should not be covered by a resale obligation regardless of whether it is part of a bundled offering. PCIA requests the Commission to correct this ambiguity and to clarify that its decision does not imply

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[26] *See First Report and Order*, ¶ 31; *see also* Comments of AT&T Corp., CC Docket No. 94-54, at 26 n.56 (filed June 14, 1995) [hereinafter *AT&T Comments*].

[27] *First Report and Order* at *id.*

that non-Title II components of bundled service and CPE packages are subject to the resale rule.

Initially, the Commission appears to have misunderstood AT&T's notation. AT&T did not suggest that all bundled packages including non-Title II components be excluded from the resale rule. Rather, AT&T pointed out that, because the CPE component is not subject to Title II, it cannot be covered by the resale obligation. AT&T expressly recognized that the service component of a bundled offering would, however, be subject to the resale rule.[28]

AT&T's comment is entirely consistent with sound Commission precedent. The resale obligation is based on Sections 201(b) and 202(a) of the Communications Act.[29] As such, services covered by the resale rule must be subject to regulation under Title II. Significantly, in the *Second Computer Inquiry*, the Commission determined that the provision of CPE is *not* a common carrier service and, therefore, is not subject to regulation under Title II.[30] The Commission's determination in this regard was affirmed by the D.C. Circuit and remains valid today.[31] It therefore follows that the

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[28] *AT&T Comments* at 26 n.56.

[29] *See Resale and Shared Use Decision*, 60 FCC 2d at 263.

[30] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, 439, *modified*, 84 FCC 2d 50 (1980), *aff'd and clarified*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd*, 56 RR 2d 301 (1984).

[31] Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198, 210 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

Commission does not have authority to require resale of the CPE component of a bundled offering, including a bundled CMRS offering. The Commission only has the authority to require that the service component -- which is subject to Title II -- be available to resellers at the same price, terms, and conditions offered to other similarly situated customers.

It is true that, in its *Cellular Bundling Order*,[32] the Commission held -- in a footnote -- that "[a]ny restrictions on resellers' ability to buy packages of CPE and services on the same basis as other customers would be unlawful."[33] The Commission's decision in the *Cellular Bundling Order* did not contain any analysis and did not address the *Second Computer Inquiry* decision. In PCIA's view, the Commission's action in the *Cellular Bundling Order* is legally fallible and cannot be reconciled with *Second Computer Inquiry*.

Notably, if the Commission's decision in the *First Report and Order* were intended to imply that CMRS providers covered by the resale rule are required to offer CPE to resellers on the same basis as other customers, such a decision is equally terse as the agency's footnote in the *Cellular Bundling Order* and lacks any analysis or acknowledgement of the Commission's prior determination that CPE is not subject to Title II. Further compounding this error, any decision to this effect would extend the

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[32] Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028 (1992).

[33] *Id.* at 4032 n.48.

resale requirement to non-Title II components of bundled CMRS offerings without having afforded interested parties notice that such action was being contemplated. Because of the lack of notice, both the record and the text of the *First Report and Order* are barren of any analysis of the legal bases or consequences of subjecting bundled CMRS CPE to a resale obligation.

In any event, the Commission should make plain that the language in the *First Report and Order* does not imply that a facilities-based CMRS operator that offers a large volume customer a number of subsidized handsets at a set cost for some predetermined number of minutes of use would be obligated to offer the same equipment terms -- including the same number of subsidized phones at the same subsidized price -- to a reseller. Any such requirement would lead to an absurd result by leaving the facilities-based carrier at a distinct disadvantage vis-a-vis reseller competitors, which face significantly lower operating costs, and would force emerging CMRS operators to discontinue effective marketing techniques, such as handset subsidies, that are necessary to compete with established cellular providers.[34] This, in turn, would disserve the public interest by slowing the development of new CMRS

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[34] Under well established precedent, a facilities-based operator would be justified in refusing to extend the same offer to a reseller in this set of circumstances because resellers are not "similarly situated" to other customers due to differences in competitive circumstances or conditions as well as other considerations. *See, e.g.*, Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5903 & n.216 (1991).

services and the introduction of competitive CMRS offerings. These are results the Commission could not intend to sanction.

Moreover, there is no conceivable rationale for forcing facilities-based carriers to subsidize equipment used by their competitors. Requiring facilities-based carriers to offer resellers subsidized equipment overlooks the fact that the carrier is in no better position than the reseller to negotiate with an equipment manufacturer. Likewise, resellers are free to buy handsets in bulk and subsidize them for their own customers.

C. The Commission Should Make Plain That the CMRS Resale Rule Does Not Require Carriers To Provide Access To Proprietary Technologies and Products.

In the *First Report and Order*, the Commission rejected GTE's request that the agency clarify that its resale policies do not require facilities-based operators to provide access to proprietary technologies and products.[35] The Commission stated that it was not persuaded by GTE's request because "the resale rule does not prevent a provider from recovering costs incurred in providing a service, including the costs of developing an underlying technology, or from inserting in its agreements appropriate, non-discriminatory terms to protect its interests."[36] Although the Commission recognized that "concerns regarding proprietary information or technology might under some

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[35] *First Report and Order*, ¶ 32; *see also* Reply Comments of GTE, CC Docket No. 94-54, at 15-16 (filed July 14, 1995).

[36] *First Report and Order* at *id.*

circumstances constitute reasonable justification for restricting resale," it concluded that the record before it was "insufficient to establish what those conditions might be with enough precision to permit formulation of a general rule."[37]

In recent years, the CMRS marketplace has emerged as one of the most vibrant and technically innovative industry segments in the country. As the level of competition in the industry continues to grow, it is anticipated that CMRS providers will endeavor still harder to introduce products and services on the technological cutting edge in order to acquire new customers and distinguish themselves from competitors.

Requiring these operators to provide competitors access to their proprietary technologies will create a disincentive to the development of new offerings because underlying carriers will not be able to retain control over the products and technologies in which they invested considerable resources in an effort to make themselves unique. A regulatory requirement that undermines carriers' ability to distinguish themselves in the marketplace will threaten the competitive edge innovative operators have secured, and will deter devotion of future scarce resources to the development of new offerings, ultimately harming consumers.[38] Accordingly, PCIA urges the Commission to make

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[37] *Id.*

[38] Consistent with this analysis, the Illinois Commerce Commission ("ICC") recently held that Section 251(c) of the Communications Act does not require Ameritech, the incumbent Local Exchange Carrier, to provide proprietary services to resellers on a wholesale basis, subject to ICC review on a case-by-case basis. *See*

(continued...)

plain that the CMRS resale rule in no way mandates providing competitors access to proprietary technologies and products.

D. The Commission Should Revise the Definition of "Covered SMR Providers" To Premise the Determination of Whether a Particular SMR System Is "Covered" on a Simple Mobile Count.

In the *First Report and Order*, the Commission indicated that those SMR providers that have significant potential to compete directly with cellular and broadband PCS providers in the near term should be subject to the CMRS resale requirement.[39] The Commission defined "covered SMR providers" to include two classes of SMR licensees: (1) 800 MHz and 900 MHz SMR licensees that hold geographic area licenses; and (2) incumbent wide-area SMR licensees, defined as licensees that have obtained extended implementation authorizations in the 800 MHz or 900 MHz SMR service, either by rule or by waiver. In addition, the Commission stated that, within these classes, "covered SMR providers" encompasses only those licensees "that offer real-time, two-way switched voice service that is interconnected with the public

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[38] *(...continued)*
AT&T Communications of Illinois, Inc., Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company, d/b/a Ameritech Illinois and Central Telephone Company Pursuant To Section 13-505.5 of the Illinois Public Utilities Act, No. 95-0458 (June 26, 1995).

[39] *First Report and Order*, ¶ 19.

switched network, either on a stand-alone basis or packaged with other telecommunications services."[40]

The Commission expressly excluded "local SMR licensees offering mainly dispatch services to specialized customers in a non-cellular system configuration" and "licensees offering only data, one-way, or stored voice services on an interconnected basis," noting that these licensees "do no compete substantially with cellular and broadband PCS providers."[41] In addition, the Commission stated that the costs of applying the resale rule to these licensees would outweigh the benefits, and expressed concern that inclusion of these entities would disserve the public interest.[42]

PCIA agrees with the Commission's intention to exclude from the resale requirement those SMR licensees that do not have significant potential to compete directly with cellular and broadband PCS. In attempting to construct a rule to this effect, the Commission must be mindful of the fact that the definition of "covered SMR providers" adopted in the CMRS resale context -- and any revisions made in response to this request for reconsideration -- will impact a number of additional regulatory

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40 *Id.*

41 *Id.*

42 *Id.*

responsibilities recently imposed on "covered" SMR licensees in the agency's E911, number portability, and CMRS roaming proceedings.[43]

In crafting its definition of "covered SMR providers," the Commission did not take into account that geographic area SMR licensees may choose to offer "mainly dispatch services to specialized customers in a non-cellular system configuration." Moreover, at 900 MHz, an allocation of ten channels is hardly sufficient to permit a licensee to "compete substantially with cellular and broadband PCS providers" regardless of the technology used. Similarly, depending on the final rules adopted in the 800 MHz SMR proceeding, there may be hundreds of "local" geographic SMR licensees with 5 to 20 channels offering a minuscule amount of interconnection. Comparable scenarios could also occur in the 220-222 MHz band, where the Commission is considering geographic-area licensing rules likely to result in the creation of small SMR operators offering limited interconnection.

PCIA believes that the Commission intended to exclude these types of systems from the CMRS resale requirement, as well as the recently adopted E911, number portability, and roaming obligations. In order to effectuate this result, PCIA has held numerous discussions with its members and reviewed a variety of proposals aimed at

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[43] The Commission has used the same definition of "covered SMR providers" in each of these proceedings. *See* Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, FCC No. 96-284, ¶ 12 (released Aug. 13, 1996); Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, FCC No. 96-264, ¶ 81 (released July 26, 1996); Telephone Number Portability, FCC No. 96-286, ¶ 155 (released July 2, 1996).